



**Montana Governor's Conference on Workers' Compensation
August 27, 2016**

***"The Challenges of Applying a 20th Century Law to the Evolving 21st
Century Workplace"***

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President, WILG**



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View from the Department of Industrial Accidents-Boston



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"One if by land, two if by sea."



Spotlight on Workers' Comp.



Chipping Away at the Grand Bargain

ProPublica Reports by Michael Grabell

- Inside Corporate America's Campaign to Ditch Workers' Compensation
- The Demolition of Workers' Compensation
- How Much is Your Arm Worth?
- The Fallout of Workers' Comp. "Reforms"
- Insult to Injury
- "All of This Because Somebody Got Hurt at Work"
- Tyson Foods' Secret Recipe for Carving Up Workers' Comp.



OSHA Report on Cost Shifting



“The failure of many employers to prevent millions of work injuries and illnesses each year, and the failure of the broken workers’ compensation system to ensure that workers do not bear the costs of their injuries and illnesses, are truly adding inequality to injury.”

Department of Labor Letter

The Bernie Sanders “Letter” (To the Secretary of Labor)





“Dear Secretary Perez:

As Members of Congress who are concerned about a pattern of detrimental changes to state workers’ compensation laws and the resulting cost shift to public programs like Social Security Disability Insurance, we are writing to express our interest in working with the Administration to strengthen the safety net for workers injured on the job and improve the oversight of state workers’ compensation systems.”

“The race to the bottom now appears to be nearly bottomless, as some states are adopting opt-out laws which enable employers to set up their own ERISA-based workers’ compensation programs where employers can establish certain exclusions, heightened thresholds for causality and abbreviated time periods for employees to report an injury. Where injured employees want to appeal an employer’s decision, opt-out plans permit an employer-controlled appeals process and injured employees could lose access to state courts or workers’ compensation commissions. Federal court review of these ERISA plans is constrained inasmuch as courts cannot evaluate the adequacy of a plan’s benefits, and review is limited to a determination of whether the employer’s conduct was arbitrary and capricious in interpreting their plan. This raises serious concerns.”

Secretary Perez's Response

- U.S. Department of Labor Secretary Thomas Perez says his agency will use its "bully pulpit" to strike at what he calls "a disturbing trend" that leaves workers without medical care and wage replacement payments when they are injured on the job.
- Perez also confirms a Labor Department investigation of an opt-out alternative to state-regulated workers' compensation that has saved employers millions of dollars but that he says is "undermining that basic bargain" for American workers.
- Perez says the probe focuses on a practice by thousands of employers in Texas and Oklahoma to opt out of conventional state workers' compensation in favor of benefits plans that provide lower and fewer payments, make it more difficult to qualify for benefits, control access to doctors and limit independent appeals of benefits decisions.
- "What opt-out programs really are all about is enabling employers to reduce benefits," Perez says. Opt-out programs "create really a pathway to poverty for people who get injured on the job."



Nationwide Corrosion of Workers' Compensation

- “...In my view, the state workers’ compensation system(s) is in its most dire situation in at least the last half-century...”*

*Concluding remarks made by **Prof John F. Burton, Jr**, Emeritus Prof. at Rutgers Univ. and Cornell Univ., in a Keynote address for the **Centennial Celebration of the Pennsylvania Workers’ Compensation** program. **June 1, 2015** , Philadelphia, PA.

Constitutional tipping point reached?

- **OKLAHOMA – VASQUEZ V. DILLARD'S INC.**
 - Holding #18 – “...*The appearance of equal treatment under the dual system is like a water mirage on the highway that disappears upon close examination...*”
 - TORRES V. SEABOARD FOODS LLC (OK S.Ct., 2016 OK 20, 3/1/16)

- **FLORIDA – *PADGETT V. STATE OF FLORIDA**

(11th JCC – Miami-Dade, 11-13661 CA 25, 8-14-14)

Judgment: Chap 440, F.S. exclusive remedy was **violation of due process** requirements of 14th Amendment to US Const, and Florida Const. by providing **inadequate** WC benefits in exchange for the right to trial by jury.

WESTPHAL V. CITY OF ST.PETERSBURG (RE: INDEMNITY CAPS)

CASTELLANOS V. NEXT DOOR COMPANY (RE: ATTY FEES)



National Summits/Programs

- IAIABC-Washington DC, February 2016
- WCRI- Boston, March 2016 two Opt Out Panels
- Santa Fe IAIABC- April 2016
- Dallas Workers' Compensation Summit "The Conversation Begins" -May 2016 (Bob Wilson)
- "The Conversation Continues"- Orlando, August 2016
- Roscoe Pound Civil Justice Institute Camden NJ- September 2016



21st Century Workforce Concerns

- See “An Illinois Workers’ Compensation System for the 21st Century” by Mark Adams

www.illinoispolicy.org

- Aging workforce
- Rise in telecommuting
- Flexible work hours
- Texas Model (Non-subscriber state)
- Opt Out Models

Our Biggest Concern

- “The most effective way for the government to protect workers is not [the current workers’ compensation system] but by [Employer] creating... rules of the same to give workers more freedom to contract with Employers for a deal that is better suited to their own situation.”

“Opt Out”

Oklahoma Injury Benefit Act (OIBA)

- Provides injuries arising out of and scope of employment: work activities must be major cause of injury.
- Cumulative trauma covered if work activity is major cause.



Dillard's Department Store Plan

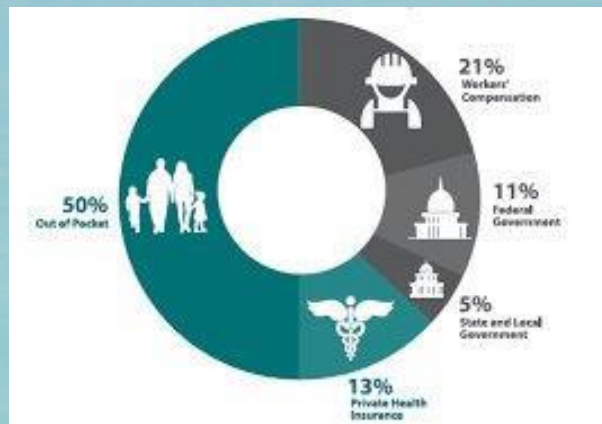
- Mold exposure not covered
- Bacterial infection not covered
- Asbestos exposure not covered
- Innocent person assaulted not covered
- Repetitive use injury not covered
- Cumulative trauma covered only if from “rapid” movement

“Opt Out” cont.

- Opt out eliminates state agency regulations of system performance.
- Some plans have a 24-hour reporting period or claim is barred
- Some plans reduce or bar benefits if employee violates a work rule or lifting restriction
- Employer appointed arbitrator
- Appeals under ERISA to federal court

“Opt Out” cont.

- Opt Out increases cost shifting.



“Opt Out” cont.

OIBA- Medical Treatment

- Reasonable, necessary, and related is covered.
- Unsuccessful surgery is covered
- Emergency Care at hospital ER is covered
- Nursing home or rehab facility covered if medically necessary.

Dillard's- Medical Treatment

- If preapproved by carrier, it is covered
- Treatment not covered if 60-day gap in treatment
- Not covered unless seen by company doctor within 14 days of injury
- Covered only if claims administration finds it necessary
- Surgery covered only if successful and return worker to “normal preinjury function”
- ER visits covered only if company is notified within 24 hours and worker has follow-up treatment.
- Nursing home or rehab facility not covered



REJECTED
**WORK INJURY
CLAIM**

Summary

- Workers' Compensation is a RIGHT owned by and owed to workers
- It is NOT another Employer Benefit Plan

DEFEAT OPT OUT

ARAWC->



<-STATE
LEGISLATOR



Thank you!

Alan S. Pierce

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